

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

WP(C).No. 12345 of 2004(T)

PETITIONER:

**V.C.DEEPAMOL, HIGHER SECONDARY SCHOOL
TEACHER (MATHEMATICS), V.C.S.HIGHER SECONDARY
SCHOOL, PUTHENVELIKKARA, ERNAKULAM.**

**BY ADV. SRI.K.JAJU BABU
SMT.M.U.VIJAYALAKSHMI**

RESPONDENTS:

- 1. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT, GENERAL EDUCATION
DEPARTMENT, GOVERNMENT SECRETARIAT, TRIVANDRUM.**
- 2. THE DIRECTOR OF HIGHER SECONDARY
EDUCATION, HOUSING BOARD BUILDINGS, SHANTHI
NAGAR, TRIVANDRUM-1.**
- 3. THE MANAGER, VIVEKA CHANDRIKA SABHA
HIGHER SECONDARY SCHOOL, PUTHENVELIKKARA,
ERNAKULAM DISTRICT.**
- 4. SMT.P.V.LEENA, UPSA, VEVEKA CHANDRIKA
SABHA HIGHER SECONDARY SCHOOL, PUTHENVELIKKARA,
ERNAKULAM DISTRICT.**
- 5. C.A.SABU, HIGHER SECONDARY SCHOOL
TEACHER, VIVEKA CHANDRIKA SABHA HIGHER
SECONDARY SCHOOL, PUTHENVELIKKARA, ERNAKULAM
DISTRICT.**

**BY ADV. SRI.N.D.PREMACHANDRAN - R4
SRI.BENOY THOMAS - R5
SRI.B.GOPAKUMAR - R3
SMT.CHINCY GOPAKUMAR
GOVERNMENT PLEADER SMT.T.B.RAMANI - R1 & R2**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 06/07/2007, THE COURT ON 03/08/007 DELIVERED THE
FOLLOWING:**

W.P.(C) NO.12345/2004

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ORDER OF APPOINTMENT WITH APPORVAL ISSUED TO THE PETITIONER BY THE DEO VIDE NO.B4-5011/98 DT. 6.2.99.

EXT.P2:- COPY OF THE APPOINTMENT ORDER VIDE NO.M-19/988 DT. 18.9.98 ISSUED BY THE 3RD RESPONDENT, TO THE PETITIONER.

EXT.P3:- COPY OF THE ORDER NO.ACD.A1/6220/H&E DT. 17.8.02 ISSUED BY THE 2ND RESPONDENT.

EXT.P4:- COPY OF THE APPROVAL GIVEN TO THE PETITIONER BY THE 2ND RESPONDENT DT. 16.11.02.

EXT.P5:- COPY OF THE JUDGMENT DT. 2.7.03 IN OP. NO.30188/02 OF THIS HONOURABLE COURT.

EXT.P6:- COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DT. 28.7.03 (WITHOUT EXHIBITS)

EXT.P7:- COPY OF THE ORDER NO.GO(RT) NO.1089/04/.EDN. DT. 15.3.04 ISSUED BY THE 1ST RESPONDENT.

RESPONDENTS EXHIBITS

EXT.R4(a):- COPY OF THE ORDER NO.C2-9791/HSE/98 DT. 2.2.2000 OF THE 2ND RESPONDENT.

EXT.R4(b):- COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN OP. 7846/2000 DT. 1.11.2000.

EXT.R4(c):- COPY OF THE JUDGMENT IN WA. 3088/2000 DT. 11.12.2000 OF THIS HONOURABLE COURT.

EXT.R4(d):- COPY OF THE PROCEEDINGS NO.ACD A1/6220/HSE DT. 17.8.02 OF THE 2ND RESPONDENT.

EXT.PR4(e):- COPY OF THE APPOINTMENT ORDER DT. 1.8.03 .

EXT.R4(f):- COPY OF THE REPRESENTATION DT. 15.8.03.

EXT.R4(g):- COPY OF THE ORDER OF THE 2ND RESPONDENT DT. 26.6.04.

EXT.R4(h):- COPY OF THE ORDER OF THE 2ND RESPONDENT DT. 26.6.04.

/TRUE COPY/

P.S. TO JUDGE

THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).No.12345 OF 2004-T

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Dated this the 3rd day of August, 2007.

JUDGMENT

“C R”

The 4th respondent was appointed as an Upper Primary School Assistant in 1995 in the school of which the 3rd respondent is the Manager, in a regular vacancy. That was approved. She was, thereafter, promoted as an High School Assistant.

2. By Ext.P1, petitioner was appointed as a UPSA in the leave vacancy from 1-6-1998 to 31-3-1999.

3. In the academic year 1998-1999, Higher Secondary Course was sanctioned for the school.

4. G.O.(MS.)No.162/98/G.Edn. dated 13-5-1998 laid down the conditions subject to which the Higher Secondary Courses were granted. The 3rd respondent Manager appointed the petitioner as an Higher Secondary School Teacher (Mathematics) with effect from the afternoon of 18-9-1998 as per Ext.P2.

5. Issue arose among the petitioner and the 4th respondent as to who among them was entitled to be appointed as HSST (Mathematics). That led to different proceedings before the statutory authorities, as also before this Court. By Ext.R4(b) judgment, this Court affirmed the view of the statutory authorities that the 4th respondent was entitled to be preferred. By Ext.R4(c) judgment, the matter was relegated to the statutory authorities for re-consideration. Though arguments were addressed as to the effect of Ext.R4(c) judgment on Ext.R4(b), suffice it to take the view that the relegation by Ext.R4(c) was for a consideration

of all relevant matters.

6. Ext.P5 judgment had also to be issued thereafter touching the issues. Thereby, three contesting teachers, who are the petitioner and respondents 4 and 5 herein respectively, were ordered to be accommodated in the school with a direction to the Government to decide as to what shall be the priority of their accommodation with reference to the date of occurrence of the vacancies in question.

7. The Government, thereafter, issued Ext.P7 Government Order dated 15-3-2004, whereby the 4th respondent is held entitled to hold the vacancy that arose during the academic year 1998-1999, the 5th respondent in the vacancy that arose during 1999-2000 and the petitioner in the vacancy that arose during 2001-2002.

8. At the outset, I may notice that though the 5th respondent is also made a party, there is essentially no

dispute between the parties as to his entitlement to the vacancy that arose during 1999-2000. No arguments were also addressed challenging that finding in Ext.P7. This leaves for determination, the issue as to whether it was the petitioner or the 4th respondent who was entitled to hold the vacancy that arose during the academic year 1998-1999.

9. The case projected by the petitioner is that in terms of G.O.(MS.).162, he was selected to be appointed and such appointment has been made on 18-9-1998. He, therefore, seeks the benefit of the directions of the Apex Court in **M.M.Dolichan v. State of Kerala** [(2001) 1 SCC 151] which related to the validity of the aforesaid G.O.(MS.) 162. That verdict arose from the judgment of this Court upholding the validity of the said Government Order. See [K.Krishnankutty & Ors. v. State of Kerala & Ors., 1998 (2) KLJ 301]. According to the petitioner, in terms of Direction No.3 in **Dolichan's case**, his appointment as HSST on 18-9-1998 is not liable to be disturbed. Direction No.3 in

Dolichan's case reads as follows:

“(3) If there has been any appointment made pursuant to the Government Order of 13-5-1998 as on today those appointments also would continue and will not be annulled.”

10. According to the petitioner, by reason of the protection given to his appointment as per the aforesaid direction, his entitlement to the post that arose during the academic year 1998-1999 ought not to have been disturbed by the Government as per Ext.P7 order.

11. The rival contention of the contesting 4th respondent is that she had entered service as a UPSA and that too, on a regular basis, in June 1995 much before the appointment of the petitioner against a leave vacancy on 1-6-1998. The appointment of the 4th respondent as above stood approved, while the petitioner's appointment as per Ext.P1

was yet to be approved when she was appointed as an HSST as per Ext.P2 dated 18-9-1998. According to her, the petitioner's assertion to entitlement of the vacancy that arose during the academic year 1998-1999 had not found approval of this Court in Ext.R4(b) judgment and that Ext.R4(c) judgment of the Division Bench had not watered down the findings in Ext.R4(b). As already noted by me above, such question is not being considered in this writ petition.

12. The case of the Manager is that a teacher in the service of the school as a Primary Teacher, UPSA or an HSA is not entitled to seek promotion to the category of HSST and all that G.O.(MS).162 had provided was that 25% of the vacancies would be for in-service candidates. On such basis, it is contended that whether the petitioner was in service or not was irrelevant because, a process of selection was held in which the petitioner and the 4th respondent competed and the management, through a Staff Selection Committee, found the petitioner to be more suitable.

13. In so far as comparative suitability is concerned, the 4th respondent would assert on the basis of the materials on record, quite rightly, that the statutory authorities had not accepted the version of the Manager that there was a due process of selection and still further, that the proceedings adopted by the Manager has been denounced by the other statutory authorities.

14. The issues arising for decision in this case are as to whether the 4th respondent was entitled to be considered for appointment in preference to the petitioner, as HSST and if so, whether the appointment of the petitioner, having been made by the Manager on 18-9-1998, as per Ext.P2 order, gets insulated from being dealt with, in any manner, on account of the provision in Direction No. 3 in **Dolichan's case** (supra).

15. The quality of appointment of the petitioner as per Ext.P1 is only of an appointment against a temporary vacancy

which occurred on account of a teacher proceeding on leave to acquire B.Ed. qualification. Such an appointment is one which may entitle the petitioner to make a further claim under Rule 51A of Chapter XIV-A Kerala Education Rules, if a vacancy of the same category arises in that school at a later point of time. Barring that preference, the quality of the appointment as per Ext.P1, as rightly pointed out by the learned counsel for the 4th respondent, is to warm up that seat and to vacate when the period of appointment ends or on return of the teacher who has proceeded on leave, and nothing more. The 4th respondent is, therefore, right in contending that the petitioner could not have been treated as a person "in service". There is no dispute that the 4th respondent had to her credit approved service as UPSA from June 1995. This means, she was a regular teacher in the school. If, for any purpose, the quality of office held by the petitioner under Ext.P1 and the quality of office held by the 4th respondent as UPSA from 1995 are to be compared, the views in Ext.R4(b) judgment may hold the field. But the

comparative evaluation of the quality of those offices does not appear to be relevant to decide the case in hand and that is the reason why I have chosen to exclude a decision on the controversy as to the impact of Ext.R4(c) judgment of the Division Bench on Ext.R4(b) judgment.

16. Reverting to G.O.(MS).162, paragraph 2 thereof provides a manner in which the posts of Higher Secondary School teachers in Government Higher Secondary Schools and Aided Higher Secondary Schools have to be filled up. Having regard to the nature of the contentions, it is appropriate to extract paragraph 2 of G.O.(MS) No.162/98/G.Edn. which reads as follows:

“2. The posts of Higher Secondary School teachers in Government Higher Secondary Schools and Aided Higher Secondary Schools will be filled up as follows:

- i. 25% vacancies will be reserved

for appointment from qualified High School Assistants and Primary School Teachers.

ii. The remaining 75% of posts in Government schools will be filled up by direct recruitment through the Public Service Commission. In the absence of select list with the Public Service Commission the vacancies will be filled up by candidates from Employment Exchange. Should there be shortage of suitable candidates from the Employment Exchange, Guest Lecturers may be appointed as is done in colleges. The selection of Employment Exchange candidates will be done by Director of Higher Secondary Education and that of the Guest Lecturers will be done by the concerned Deputy Director, Education by constituting a selection committee consisting of the Principal, Deputy Director/and President of the concerned PTA.

iii. Appointments to the 75% vacancies earmarked for direct recruitment

in the Aided Higher Secondary Schools will be done by the management. If qualified teachers are not available for appointment as mentioned in item (i) above, the management will fill up such vacancies also by direct recruitment. Selection of candidates for direct recruitment in Aided Higher Secondary schools will be done by a Staff Selection Committee consisting of the Manager or his representative, the Principal of the school and a Government nominee from the panel of officers consisting of Deputy Director, Education, DEO of the area and DIET Principal of the district. The management can select a nominee from among the above officers. The above officers are permitted to attend the Staff Selection Committee meeting without further sanction.”

17. 25% of vacancies have to be reserved for appointment from qualified HSAs and Primary School Teachers as per sub-paragraph (i) above. Therefore, the

existing school for which the higher secondary section is being granted has to be taken as an entire unit and 25% of the vacancies in the HSST cadre has to be reserved for the teachers in that school, who are qualified to hold the post of HSST. That provision applies to the Government Schools and the Aided Schools. Sub-paragraph (ii), which applies to Government Schools, provides that "the remaining 75%" of posts shall be filled up by direct recruitment following the procedure prescribed therein. Sub-paragraph (iii) provides that appointments to the 75% vacancies earmarked for direct recruitment in the Aided Higher Secondary Schools will be done by the management. This term is followed by the provision that if qualified teachers are not available for appointment in terms of sub-paragraph (i), the management will fill up such vacancies also by direct recruitment. I may at once recall that G.O.(MS),162 is only an executive order which was intended and which has, in fact, occupied a field now held by the statutory rules issued by amendment to the KER. Being an executive order, a strict and literal

construction of that order is never intended. What has to be done is to give effect to the intention of the Government as discernible from that order. The Government did not intend to provide for two types of entry, one for the Government Schools and the other for the Aided Schools, though the method of selection would be different. The term “the remaining 75%” in the opening part of sub-paragraph (ii) and the term “75% vacancies earmarked” in sub-paragraph (iii) have to be understood as clearly indicating that what is to be first done is to earmark the 25% of vacancies to be reserved for appointment from qualified teachers in terms of sub-paragraph (i). In so far as the Aided Schools are concerned, this view is further fortified by the fact that the second sentence in sub-paragraph (iii) provides the manner in which the 25% quota has to be dealt with only in the event of qualified teachers becoming not available. The intention, is, therefore categorical, that 25% vacancies should be available for appointment from qualified teachers and that cannot be encroached upon by direct recruitment from the open market.

The ratio has to be maintained in the total number of vacancies and cannot be on the basis of identifying the vacancies with reference to the subjects in the higher secondary level.

18. The question that now arises for decision is as to whether the teachers for appointment as against 25% vacancies have to undergo and succeed in a process of selection, for the purpose of appointment in terms of G.O. (MS).162. Sub-paragraph (i) is specific that 25% vacancies shall be reserved for appointment from qualified teachers. No method of selection is prescribed. Therefore, if teachers who are qualified are available, appointments against 25% vacancies shall follow. The question as to the manner of dealing with a situation where there are more number of qualified teachers than the available vacancies against 25% quota, does not arise for decision in this case. The said issue is left open. Further, sub-paragraph (iii) provides a method of selection for direct recruitment in Aided Schools, to be done

by a Staff Selection Committee of the composition laid down in that sub-paragraph. Such a provision having been made for selection for direct recruitment, the absence of a similar provision for selection from among the qualified teachers is a clear indication that under normal circumstances there is no question of a selection and evaluation of comparative merit for the purpose of appointment against 25% quota as per G.O. (MS).162. May be that, the Manager will be entitled to weed out and exclude the unfit, but no selection otherwise, is envisaged.

19. Applying the interpretation of G.O.(MS).162, as noticed above, the 4th respondent was a qualified teacher in the school in 1999. Even assuming that the petitioner is also to be treated as a teacher in service, indisputably, the 4th respondent had to her credit, at that point of time, a longer period of service, that too, approved service. The management does not have a case that the 4th respondent is unfit to be appointed as an HSST, though it was his case before the

statutory authorities that the petitioner was selected in preference to the 4th respondent. Under such circumstances, the impugned decision holding that the 4th respondent was entitled to be preferred for the vacancy of HSST (Mathematics) that arose during the academic year 1998-1999 in preference to the petitioner cannot be found fault with.

20. The short issue that now arises is as to whether the placement of the 4th respondent to the vacancy that arose during the academic year 1998-1999 and that of the petitioner to the vacancy that arose during the year 2001-2002 as per the impugned Ext.P7 are impermissible on account of any insulation available to the petitioner in terms of Direction No.3 in **Dolichan's case** (supra). All that the said direction provides is that if there has been any appointment made pursuant to G.O.(MS).162 as on the date of the judgment, i.e. 14-11-2000, those appointments also would continue and will not be annulled. The embargo was only

against the annulling of those appointments. The appointment of the petitioner made by the Manager as per Ext.P2 on 18-9-1998 does not get annulled by the impact of Ext.P7. The entitlement of the petitioner to continue in service also does not get impaired thereby. The consequences following Ext.P7 would affect only the inter se seniority of the petitioner and the 4th respondent and may be, to some extent, their entitlements to financial benefits on account of placements made thereby. In so far as financial implications are concerned, it has to be noticed that the petitioner, following Ext.P2, had worked as an HSST and such appointment was approved, though provisionally, on the basis of the interlocutory orders during the course of the litigations, to ensure that she draws her emoluments. In so far as the 4th respondent is concerned, she had not worked as an HSST during the period in question and had drawn her salaries against the post in which she worked. In so far as issue as to inter se seniority is concerned, the entitlement to promotions, grades, including the postings to higher posts and categories

would depend on the identification of the appropriate vacancy to which the petitioner and the 4th respondent have to be respectively earmarked. Such entitlements which would flow out of the subsequent amendment to the KER and the application of other statutory rules are, in no way, impaired by the ratio in **Dolichan's case**. It was never the intention of the directions in **Dolichan's case** to interfere with any such rights inter se the teachers. The direction in **Dolichan's case** (supra) was issued only to protect any deprivation of employment as a consequence of annulment of appointments made during the period during which GO(MS).162 governed the field. It is profitable in this context to refer also to the decisions of the Division Bench of this Court in **W.A.No.1638 of 2002 and connected cases** (judgment dated 18-9-2002) and in **W.A.452 of 2005** (judgment dated 26-5-2005).

In the result:

- i. The impugned Ext.P7 is upheld.

ii. It is directed that the service of the petitioner on the basis of Ext.P2 till the date of occurrence of the vacancy of HSST(Jr.) in Maths which arose during 2001-2002 shall be considered as provisional and shall, in no manner, affect the rights of the 4th respondent.

iii. Any emoluments drawn by the petitioner on the basis of Ext.P2 and which she would be entitled to draw by treating it as a provisional appointment shall not be recovered, but shall be released.

No costs.

Sd/-
THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/-

-true copy-

P.S.to Judge.